

§ 10.26

documents and other physical evidence relied upon by the Director, Division of Facilities and Security, in making a finding that a question exists regarding the eligibility of the individual for an NRC access authorization and/or an employment clearance in accordance with the provisions of this part. When the presence of a witness and the production of documents and other physical evidence is deemed by the Hearing Counsel to be necessary or desirable for a determination of the issues, the Director, Division of Facilities and Security, will make arrangements for the production of evidence and for witnesses to appear at the hearing by subpoena or otherwise.

(b) Hearing Counsel is authorized to consult directly with individual's counsel or representative or the individual, if the individual is not so represented, for purposes of reaching mutual agreement upon arrangements for expeditious hearing of the case. Such arrangements may include clarification of issues and stipulations with respect to testimony and contents of documents and other physical evidence. Such stipulations when entered into shall be binding upon the individual and the NRC for the purposes of this part. Prior to any consultation with the individual, the Hearing Counsel shall advise the individual of his or her rights under this part, of his or her right to counsel or other representation, and of the possibility that any statement made by the individual to the Hearing Counsel may be used in subsequent proceedings.

(c) The individual is responsible for producing witnesses in his or her own behalf and/or presenting other evidence before the Hearing Examiner to support the individual's answer and defense to the allegations contained in the notification letter. When requested by the individual, however, the Hearing Counsel may assist the individual to the extent practicable and necessary. The Hearing Counsel may at his or her discretion request the Director, Division of Facilities and Security, to arrange for the issuance of subpoenas for witnesses to attend the hearing in the individual's behalf, or for the production of specific documents or other physical evidence, provided a showing

of the necessity for assistance has been made.

[47 FR 38676, Sept. 2, 1982, as amended at 64 FR 15643, Apr. 1, 1999]

§ 10.26 Appointment of Hearing Examiner.

The appointment of a Hearing Examiner, pursuant to §10.24 of this part, shall be from a list of qualified attorneys possessing the highest degree of integrity, ability, and good judgment. To qualify, an attorney shall have an NRC "Q" access authorization and may be an employee of the NRC, its contractors, agents or licensees. However, no employee or consultant of the NRC shall serve as Hearing Examiner hearing the case of an employee (including a consultant) or applicant for employment with the NRC; nor shall any employee or consultant of an NRC contractor, agent or licensee serve as Hearing Examiner hearing the case of an employee (including a consultant) or an applicant for employment of that contractor, agent, or licensee. No Hearing Examiner shall be selected who has knowledge of the case or of any information relevant to the disposition of it, or who for any reason would be unable to issue a fair and unbiased recommendation.

§ 10.27 Prehearing proceedings.

(a) After the appointment of the Hearing Examiner, he or she shall be furnished the record in the case, which shall consist of the letter of notification, the request for hearing and its supporting answer, and the notice of hearing, if it has been issued, and any stipulations agreed to by the individual and the Hearing Counsel.

(b) The Hearing Examiner may on his or her own motion, or on that of either party, convene a prehearing conference with the Hearing Counsel and the individual and his or her counsel or representative, if any, for the purpose of clarifying the issues, identifying witnesses who may be called, identifying documents and other physical evidence that may be offered into evidence, and entering into stipulations of fact.

(c) The parties will be notified by the Hearing Examiner at least ten days in advance of the hearing of the time and place of the hearing. For good cause

shown, the Hearing Examiner may order postponements or continuances from time to time. If, after due notice, the individual fails to appear at the hearing, or appears but is not prepared to proceed, the Hearing Examiner shall, unless good cause is shown, return the case to the Director, Division of Facilities and Security, who shall make a recommendation on final action to be taken, through the Director, Office of Administration, to the Deputy Executive Director for Management Services on the basis of the information in the possession of the NRC.

[47 FR 38676, Sept. 2, 1982, as amended at 52 FR 31609, Aug. 21, 1987; 54 FR 53316, Dec. 28, 1989; 64 FR 15643, Apr. 1, 1999]

§ 10.28 Conduct of hearing.

(a) The Hearing Examiner shall conduct the hearing in an orderly, impartial and decorous manner. Technical rules of evidence may be relaxed so that a full evidentiary record may be made based on all material and relevant facts. Hearsay evidence may for good cause shown be received at the discretion of the Hearing Examiner and accorded such weight as the circumstances warrant.

(b) The proceedings shall be open only to duly authorized representatives of the staff of the NRC, the individual, his or her counsel or representative, and such persons as may be officially authorized by the Hearing Examiner. Witnesses shall not testify in the presence of other witnesses except that the Hearing Examiner may, at his or her discretion, allow for expert witnesses to be present during testimony relevant to their own testimony.

(c) Witnesses, including the individual, shall be examined under oath or affirmation by the party who called them and may be cross-examined by the other. The Hearing Examiner shall rule on all evidentiary matters, may further examine any witness, and may call for additional witnesses or the production of documentary or other physical evidence if, in the exercise of his or her discretion, such additional evidence is deemed necessary to the resolution of an issue.

(d) If it appears during the hearing that Restricted Data or national security information may be disclosed, the

Hearing Examiner shall assure that disclosure is made only to persons authorized to receive it.

(e) The Hearing Examiner may, at any time during the hearing, permit the Hearing Counsel to amend the notification letter to add or modify allegations to be considered. In the event of such an amendment to the notification letter, the individual shall be given an opportunity to answer the amended allegations. If the changes are of such a substantial nature that the individual cannot answer the amended allegations without additional time, the Hearing Examiner shall grant such additional time as he or she deems necessary.

(f) The Hearing Examiner may receive and consider evidence in the form of depositions or responses to interrogatories upon a showing that the witness is not available for good reason such as death, serious illness or similar cause, or in the form of depositions, interrogatories, affidavits or statements with agreement of the parties. The Hearing Examiner may take official notice at any stage of the proceeding, where appropriate, of any fact not subject to reasonable dispute in that it is either (1) generally known within the United States or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking such official notice. In the absence of prior notification the request may be made after notice is taken.

(g) Hearing Counsel shall examine and cross-examine witnesses and otherwise assist the Hearing Examiner in such a manner as to bring out a full and true disclosure of all facts, both favorable and unfavorable, having a bearing on the issues before the Hearing Examiner. In performing these duties, the Hearing Counsel shall avoid the attitude of a prosecutor and shall always bear in mind that the proceeding is an administrative hearing and not a trial.

(h) Hearing Counsel shall not participate in the deliberations of the Hearing Examiner, and shall express no opinion to the Hearing Examiner concerning the merits of the case. Hearing Counsel shall also, during the course of the hearing, advise the individual of his or